Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

MICHAEL MONROE,

Petitioner,

vs.

RAYMOND BOOKER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER A CERTIFICATE OF APPEALABILITY (COA) SHOULD ISSUE WHEN THE DISTRICT COURT DETERMINES THAT A SINGLE AMBIGUOUS SENTENCE BY THE STATE SUPREME COURT CONSTITUTES A REASONED STATE COURT JUDGMENT, SUPPORTING A STATE PROCEDURAL DEFAULT PRECLUDING HABEAS REVIEW?

II. WHETHER INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN FAILING TO RAISE A CLAIM THAT THE PLEA WAS INVOLUNTARY AND UNSUPPORTED BY A SUFFICIENT FACTUAL BASIS, OVERCOMES ANY PERCEIVED PROCEDURAL DEFAULT?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The Sixth Circuit Court of Appeals issued its Order denying the Motion for Certificate of Appealability. The Order is reprinted in the Appendix at 1. The District Court did not publish an opinion in this case. The Court's Opinion and Order Denying Habeas Corpus Petition and Declining to Issue a Certificate of Appealability are reprinted in the Appendix at 2-16.

JURISDICTION

The Sixth Circuit issued its Order on December 6, 2004. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Circuit Court's decision on a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment VI

Reads in pertinent part:

"In all criminal prosecutions, the accused shall enjoy . . . and to have the assistance of counsel for his defense."

U.S. Const., Amendment XIV

Reads in pertinent part:

"No State shall make or enforce any law . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

28 U.S.C §2253(c)(1)

Provides in relevant part:

" . . . [U]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the Court of Appeals . . . "

STATEMENT OF THE CASE

The Petitioner, Michael Monroe, was charged by the State of Michigan with First Degree Murder, two counts of Assault With Intent to Commit Murder, Possession of a Firearm in the commission of those felonies, and being a Habitual Offender. On the first day of the jury trial, Mr. Monroe reached a plea agreement with the prosecutor, and pled no contest to Second Degree Murder and the two assault counts in exchange for a dismissal of the original charge of first degree murder, the firearm charge, and the habitual offender charge. Petitioner agreed to be sentenced to a term of fifteen to thirty years in prison.

However, before sentencing Mr. Monroe moved to withdraw his plea, protesting his innocence. The trial attorney informed the state court judge that Mr. Monroe never admitted or conceded he had anything to do with the crimes. Moreover, the attorney stated that Mr. Monroe felt scared into pleading based on the attorney's advice that Petitioner had no option but to plead. In doing so, the attorney misled Mr. Monroe about whether the prosecutor could use his prior assault conviction and the co-defendant's statement at trial. The state court judge denied the motion to withdraw his plea and proceeded to impose the agreed sentence. Since that time, Mr. Monroe

has been unable to gain any relief from his conviction and sentence.

On his appeal as of right, appellate counsel raised a single claim that the trial court abused his discretion in denying the motion to withdraw the plea. The Michigan Court of Appeals denied leave to appeal " . . . for lack of merit in the grounds presented." The Michigan Supreme Court denied leave to appeal because the court " . . . was not persuaded that the question presented should be reviewed."

Mr. Monroe filed a post-conviction pro se Motion for Relief from Judgment. The trial court denied the motion for lack of merit. The Michigan Court of Appeals, likewise, denied leave to appeal ". . . for lack of merit in the grounds presented." However, the Michigan Supreme Court issued an order denying leave to appeal in a simple sentence stating Petitioner had, " . . . failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)."[1]

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[1] MCR 6.508(D) applies to Motions for Relief from Judgment as set forth in MCR 6.500 et seq. and provides in relevant part:

(D) **Entitlement to Relief.** The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the

(Continued on following page)

Mr. Monroe then filed a timely pro se Petition for Writ of Habeas Corpus setting forth four claims. Those claims are identified in the District Court's opinion in the Appendix at 3-4.

The District Court dismissed the Petition finding that the first and second claims were procedurally defaulted, the third claim lacked merit and the forth claim was not cognizable. The court further refused to issue a COA concluding that reasonable jurists would not find the court's conclusions debatable on either the substance or procedural rulings. Appendix at 16.

The Sixth Circuit issued its order denying the motion for a COA without a reason or explanation. Appendix at 1.

REASONS FOR GRANTING THE WRIT

Mr. Monroe is entitled to a COA for the Sixth Circuit Court of Appeals to review the merits of his habeas petition, denied by the District Court.

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conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief . . .

A court may deny relief under MCR 6.508(D) for procedural or nonprocedural grounds simply because a defendant failed to meet the burden of "establishing entitlement to the relief requested."

ARGUMENT

I. WHEN THE STATE SUPREME COURT FAILS TO CLEARLY AND EXPRESSLY RELY ON A STATE PROCEDURAL BAR TO DENY RELIEF, THERE CAN BE NO PROCEDURAL DEFAULT AND A CERTIFICATION OF APPEALABILITY SHOULD ISSUE FOR THE APPELLATE COURT TO RULE ON THE MERITS OF THE HABEAS PETITION.

A. STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY.

When seeking a Certificate of Appealability (COA), a person is required to make a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(1). The granting of a COA essentially means that the appeal is not "frivolous" and that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, that is, the District Court's assessment is debatable or wrong, *or* that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-1604, 14 L. Ed. 2d 542 (2000); *Barefoot v. Estelle*, 463 U.S. 888, 893 n. 4, 103 S. Ct. 383, 77 L. Ed. 2d 1090 (1983). More recently, this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) reversed the judgment of the Fifth Circuit Court of Appeals denying a Certificate of Appealability from the District Court's denial of habeas relief. This Court held that a state prisoner satisfies the standard of showing a substantial denial of a constitutional right "by demonstrating that jurists of reason could disagree with the District Court's resolution of his constitutional claims or that jurists could conclude the issues are adequate to

deserve encouragement to proceed further." The Certificate of Appealability should not be denied merely because a court believes the Petitioner does not demonstrate an entitlement to relief or that some jurist would not actually grant the petition. *Miller-El v. Cockrell*, 537 U.S. at 328. In short, the fact that a court may not believe Petitioner Monroe is entitled to habeas relief does not, in itself, require denial of a request for a Certificate of Appealability. *Lozada v. Reeds*, 498 U.S. 430, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991); *Barefoot v. Estelle, supra*.

In addition, before a court may issue a COA in a case where the §2254 petition has been denied on a procedural ground without reaching the underlying constitutional claims, the court must find that a reasonable jurist could conclude that the District Court erred in dismissing the case *or* that the case should be allowed to proceed further. *Slack v. McDaniel, supra*, 529 U.S. at 484 (2000).

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the district court was correct in its procedural ruling, *id.*

In the present case, Petitioner Monroe has made the necessary showing for the granting of a COA as reasonable jurists could debate whether, or find that the District Court's resolution of the claim was in error or that Petitioner Monroe should be allowed to proceed further.

B. APPLICATION.

Petitioner Monroe filed his Pro Se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 seeking habeas relief from his state convictions for second degree murder and two (2) counts of assault with intent to murder. The substantive claim as set forth in Argument one (1) of the Petition was that Petitioner Monroe was denied his right to effective assistance of trial counsel when his attorney improperly induced him to accept a no contest plea despite Petitioner's claim of innocence, rendering the plea involuntary. In his second claim, Petitioner argued that he was denied due process of law when the trial court failed to find a factual basis to support the no contest plea. In the third claim, Petitioner argued that his appellate counsel on his appeal of right deprived him of effective assistance of counsel by failing to raise the first two (2) claims set forth in the Petition. Finally, in claim four (4), Petitioner argued he was denied due process and equal protection by the trial court's refusal to allow Petitioner to withdraw his plea prior to sentencing.

The District Court Judge issued her Opinion and Order denying the Habeas Corpus Petition and declining to issue a Certificate of Appealability, along with a Judgment dismissing the Petition. The District Judge concluded that Petitioner's first and second claims were procedurally defaulted, the third claim lacked merit and the fourth claim was not cognizable on habeas review. Appendix at 16. The District Court Judge applied only the first part of this Court's standard for granting a COA. The District Court Judge failed to address that the claims were adequate to deserve further review.

C. PROCEDURAL DEFAULT.

Generally, a habeas petitioner must present his claims in accordance with state procedural rules. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). A procedural default in the state courts may preclude federal habeas relief if the last state court rendering a judgment in the case rests its judgment on a procedural default. *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991).

However, a federal court may still consider procedurally defaulted claims.

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

Here, the Michigan Supreme Court issued a standard ambiguous one sentence order denying leave to appeal because Petitioner had " . . . failed to meet the burden of establishing entitlement to relief under 6.508(D) . . . " However, both the Michigan Court of Appeals and the trial court ruled on the merits.

Petitioner contends that this single ambiguous phrase does not constitute a reasoned State court judgment and therefore cannot constitute an independent and adequate

State ground supporting a State procedural default for habeas review purposes.[2]

1. CAUSE.

Petitioner Monroe sets forth his claim of "cause" by way of ineffective assistance of appellate counsel, in the third claim of his Petition. As the District Judge properly noted, this claim itself cannot be procedurally defaulted because there is no mechanism to raise ineffective assistance of *appellate* counsel on the appeal as of right. There can be no question that ineffective assistance of counsel can be sufficient to establish cause. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

(A) INEFFECTIVE ASSISTANCE OF COUNSEL.

It is well-settled that the right of a state criminal defendant to the effective assistance of counsel for his defense at trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Evitts v. Lucy*, 469 U.S. 387, 396, 105 S. Ct. 1783, 84 L. Ed. 2d 814 (1985); *Northrop v. Triplett*, 265 F.3d 372 (6th Cir. 2001); *Groseclose v. Bell*, 130 F.3d 1161, 1167 (6th Cir. 1997) *Blackburn v. Foltz*, 828 F.2d 1177, 1180 (6th Cir. 1987).

The federal standard of review for an ineffective assistance of counsel claim is found in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

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[2] In accord, *Abela v. Martin*, 380 F.3d 915 (2004); contra, *Simpson v. Jones*, 238 F.3d 399 (6th Cir. 2000).

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defensible by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced that defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Prejudice requires that the habeas petitioner show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different", *id.*, at 694.

In other words, "a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra*, 466 U.S. at 694; *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1995, 146 L. Ed. 2d 384 (2000). Although a criminal defendant cannot demand that his appellate counsel raise every possible colorable claim on appeal, "winnowing out weaker arguments on appeal and focusing on those more likely to prevail . . . is the hallmark of effective appellate advocacy." *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986).

"An appellate advocate may deliver deficient performance and prejudice a defendant by omitting a 'dead-bang winner,' even though counsel may have presented strong but unsuccessful claims on appeal." *United States v. Cook, supra*, 45 F.3d at 395 (*quoting Page v. United States*, 884 F.2d 300, 302 (7th Cir. 1989); *see also, Manning v. Huffman*, 269

F.3d 720 (6th Cir. 2001). *See also, Coddington v. Langley*, 202 F. Supp. 2d 687, 698 (E.D. Mich. 2002) ("A 'dead-bang winner' has been defined as 'an issue which was obvious from the trial record.'") (*quoting United States v. Cook, supra*).

The federal courts have not hesitated to find ineffective assistance of appellate counsel for failing to raise important and obvious appellate issues, as here. *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995); *United States v. De La Fuente*, 8 F.3d 1333, 1336-37 (9th Cir. 1993); *Ratliff v. United States*, 999 F.2d 1023, 1026 (6th Cir. 1993); *Houston v. Lockhart*, 982 F.2d 1246, 1250-53 (8th Cir. 1993); *Freeman v. Lane*, 962 F.2d 1252, 1257-58 (7th Cir. 1992); *Hollis v. Davis*, 941 F.2d 1471, 1476-78 (11th Cir. 1991); *Rodriquez v. Young*, 906 F.2d 1153-1161 (7th Cir. 1990); *Orazio v. Dugger*, 876 F.2d 1058, 1513-14 (11th Cir. 1989); *Matire v. Wainwright*, 811 F.2d 1430, 1438-39 (11th Cir. 1987).

In this case, the submitted claims were significant, should have been obvious to appellate counsel and therefore, should have been raised on direct appeal. The sole issue raised in Petitioner's appeal as of right was that the trial court abused its discretion in denying the motion to withdraw the plea.

(1) THE PLEA WAS RENDERED INVOLUNTARY BY TRIAL COUNSEL'S COERCIVE AND INEFFECTIVE ASSISTANCE.

It is now fundamental that a guilty plea which is not made intelligently, voluntarily, and with a full understanding of the consequences, violates the due process of law

guaranteed a criminal defendant by the Fourteenth Amendment to the United States Constitution. *Parke v. Raley*, 506 U.S. 20, 113 S. Ct. 517, 523, 121 L. Ed. 2d 391 (1992); *Henderson v. Morgan*, 426 U.S. 645, 647, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976); *Tollett v. Henderson*, 411 U.S. 258, 266-267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973); *Santobello v. New York*, 404 U.S. 257, 262-64, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). A "plea of guilty shall not be accepted unless made voluntarily after proper advice and with a full understanding of the consequences." *Machibroda v. United States*, 368 U.S. 487, 493, 82 S. Ct. 510, 513, 7 L. Ed. 2d 473 (1962) (emphasis added), quoting *Kercheval v. United States*, 274 U.S. 220, 223, 47 S. Ct. 582, 71 L. Ed. 1009 (1927).

In *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 1171, 22 L. Ed. 2d 418 (1969), this Court held that:

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbest*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). *Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.*" (emphasis added).

In *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), the Court stated that:

> The plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial – a waiver of his right to trial before a jury or a judge. *Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acting done with sufficient awareness of the relevant circumstances and likely consequences.* (emphasis added).

In *McMann v. Richardson*, 397 U.S. 759, 767, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970), the Court reaffirmed the basic principle that a guilty plea must be an intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." Regarding advice of counsel in guilty pleas, the Court admonished the trial courts that " . . . defendants cannot be left to the mercies of incompetent counsel and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *Id.*, 397 U.S. at 772. A defendant is entitled to relief under *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) when he demonstrates gross error on the part of counsel in recommending that the defendant plead guilty.

> There can be no doubt that, if the allegations contained in the petitioner's motion and affidavit are true, he is entitled to have his sentence vacated. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. *Machibroda v. United States*, 368 U.S. 487, 493, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962).

In the present case, it is important to remember that the plea in this case that lead to Petitioner's conviction was a no contest plea. At no time did Petitioner state in the plea taking proceeding, facts which would support a conviction. Secondly, the plea was entered on the day of the jury trial. Both are factors strongly supporting Petitioner's claim of coercion and innocence. Additionally, Petitioner directly contacted the court and his attorney right after the plea, protesting his innocence and requesting to withdraw his plea. At the motion to withdraw, defense counsel stated:

> Again, my client never would admit or concede that he had anything to do with this (Tr., 10-01-99, pg. 14).

The attorney added that Petitioner felt scared because, based on his attorney's advice, he felt he had no options, *id.*, at 15. The attorney told the trial judge he believed Petitioner's representation and that he possibly scared him, *id.*, pg. 17. Finally, Petitioner was prepared to reject the sentence of 15 to 30 years and face a mandatory life sentence without parole.

Instead of pursuing Petitioner's innocence at trial by discussing his defense, counsel misled Petitioner to plead by telling him that his prior assault conviction could be used against him, as well as the co-defendant's statement, and the jury would convict him. Under MRE 609, this prior assault conviction was automatically barred for impeachment purposes. Additionally, the co-defendant's statements, apparently given to the police, would also have been inadmissible. *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *Crawford v. Washington*, 542 U.S. ___, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Thus, the plea was induced by misinformation of trial counsel and his failure to zealously pursue Petitioner's innocence, rendering it involuntary. That deficient performance, which is objectively unreasonable, resulted in a conviction and sentence of 15 to 30 years. The prejudice is clear. Appellate counsel's failure to raise this claim on appeal, which is clearly supported by record and would have been disclosed with a simple discussion with Petitioner, constitutes cause for the failure to raise the claim on direct appeal. Again the prejudice lies in the conviction and sentence of an involuntary plea. Therefore, this claim was not procedurally defaulted. Alternatively, there is sufficient evidence of Petitioner's actual innocence to constitute a miscarriage of justice.

It is a well-established exception that the cause and prejudice requirements will not bar review of issues for the first time on collateral review when the failure to do so would result in a miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 377-78, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); *Wainwright v. Sykes, supra*, 433 U.S. at 91; *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); *Pilchak v. Campter*, 935 F.2d 145 (8th Cir. 1991). The constitutional violation in this case, probably resulted in the conviction of one who is actually innocent.

(2) PETITIONER MONROE WAS DENIED DUE PROCESS OF LAW WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FACTUAL BASIS FOR HIS SECOND DEGREE MURDER CONVICTION AND THE TRIAL COURT FAILED TO MAKE THE NECESSARY FINDINGS TO SUPPORT THIS CONVICTION.

According to the State prosecutor's recitation of what they intended to prove at trial, Petitioner Monroe was a passenger in the vehicle from where gunfire emanated toward a house on Griggs in Detroit resulting in three (3) people being shot, one (1) of whom died. Pursuant to MCR 6.302(D)(2)(b) the trial judge must find that the facts offered supported a second degree murder. The proposed evidence did not support such a finding and the trial court failed to make the required findings.

In order for a criminal defendant to be deprived of his liberty under the Due Process Clause of the Fourteenth Amendment, a jury or judge must find that all the elements of the crime charged were proven beyond a reasonable doubt. Alternatively, the defendant must enter a guilty plea and by admission "in open court that he is in fact guilty of the offense with which he is charged." *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973). The United States Supreme Court has repeatedly required, that for federal constitutional purposes, a guilty plea must be an "admission of guilt conclusively establishing a defendant's factual guilt." *Lefkowitz v. Newsome*, 420 U.S. 283, 299, 95 S. Ct. 886, 43

L. Ed. 2d 196 (1975); *Henderson v. Morgan*, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976).

> Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

In *McMann v. Richardson*, 397 U.S. 759, 773, 766, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970), the Court found that when a defendant pleads guilty, he is:

> "convicted on his counseled admission in open court that he committed the crime charged against him; and that [a] conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged."

This Court has also recognized that a defendant may, under certain circumstances, constitutionally enter a guilty plea even when accompanied by a claim of innocence. In *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), the Court acknowledged that ordinarily, in order for a judgment of conviction to be entered, the defendant must admit that he committed the crime charged. The Court found that, "[w]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.*, 400

U.S. at 37. This Court recognized that there are circumstances when the defendant can intelligently conclude that his interests require a guilty plea conviction because there is "strong evidence of actual guilt." *Id.* 400 U.S. at 37. In *Alford*, the defendant was charged with first degree murder and "faced with strong evidence of guilt and no substantial evidentiary support for the claim of innocence," the defendant agreed to plead guilty to the *lesser* charge of second degree murder, because he faced the threat of the death penalty if he did not plead guilty. Although the defendant said he did not commit the murder, the trial court heard sworn testimony of witnesses supporting the entry of a conviction. The Court noted that in the normal case where a defendant wishes the court to accept his plea, but refuses, or cannot admit to the crime, a subsequent conviction cannot constitutionally stand. *Id.* 400 U.S. at 37-38. It is only upon a defendant's admission that he is in fact guilty, that the plea can be knowingly, intelligently, and voluntarily made, waving his constitutional rights.

In order for a conviction to be constitutionally valid, there must be a finding all the elements of the crime charged were established beyond a reasonable doubt. U.S. Const. Ams. VI, XIV; *In Re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

In Michigan, the elements of second degree murder are: (1) that the defendant caused the death of the deceased; (2) that the defendant had one of these three states of mind: the intent to kill, the intent to do great bodily harm; or knowingly creating a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions (emphasis added). *People v. Dykhouse*, 418 Mich. 488, 508-509 (1984); *People v.*

Aaron, 409 Mich. 672, 728 (1980); *People v. Welch*, 226 Mich. App. 461, 463 (1997); CJI 2d 16.5

In the present case, Petitioner Monroe was convicted on a lesser standard of proof than required by law. The trial court accepted his no contest plea when he did not have the necessary intent for second degree murder. The trial court failed to make any findings that the offered testimony was sufficient for the conviction.

The State prosecutor's statement constituted an inadequate factual basis for a conviction of second degree murder. Petitioner cannot be constitutionally required to serve a prison sentence for a crime he has not admitted to or been otherwise convicted of. The guilty plea and sentence should be set aside.

(3) THE TRIAL COURT DEPRIVED PETITIONER OF DUE PROCESS OF LAW BY REFUSING TO ALLOW HIM TO WITHDRAW HIS NO CONTEST PLEA.

The constitutional basis for Petitioner's entitlement to have his no contest plea withdrawn is set forth in Argument I, *infra*, which is incorporated by reference. When a criminal defendant's plea is not voluntary and he has been deprived of his right to effective assistance of counsel, the trial court is compelled to set the plea aside.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari and reverse the decision of the Sixth Circuit Court of Appeals with direction to address the merit of the claims.

Respectfully submitted,

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Dated: February 3, 2005

APPENDIX A

No. 04-1712

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL MONROE,	)	
Petitioner-Appellant,	)	ORDER
v.	)	
RAYMOND BOOKER, Warden,	)	(Filed Dec. 6, 2004)
Respondent-Appellee.	)	

Michael Monroe, a Michigan state prisoner, moves through counsel for a certificate of appealability and appeals a district court judgment denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

Upon consideration, the motion for a certificate of appealability is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

APPENDI B

UNITED STATES DIS RICT COURT
EASTERN DISTRICT F MICHIGAN
SOUTHERN DI ISION

MICHAEL MONROE,

Petitioner, CAS NO. 03-CV-72222-DT

v. HON ORIA A. ROBERTS
VIC

RAYMOND BOOKER,

Respondent. /

OPINION AND ORDER D NYING HABEAS CORPUS PETITION AND DE LINING TO ISSUE A CERTIFICATE OF AP EALABILITY

(Filed Apr. 5, 004)

Petitioner Michael Monroe has led an application for the writ of habeas corpus under 28 U .C. § 2254. The habeas petition attacks Petitioner's state co rt convictions in Detroit, Michigan for second-degree murder nd assault with intent to commit murder. The Court has co cluded for reasons given below that the habeas petition must e dismissed.

I. Background

Petitioner initially was cha ged with one count of first-degree murder, MICH. COM LAWS § 750.316, two counts of assault with intent to commit murder, MICH. COMP. LAWS § 750.83, and one unt of possession of a firearm during the commission of felony (felony firearm), MICH. COMP. LAWS §750.227b. H was charged in a supplemental information with bei g a habitual offender, second offense. On September 14 1999, Petitioner pleaded

no contest in Wayne County Circuit Court to one count of second-degree murder, MICH. COMP. LAWS § 750.317, and two counts of assault with intent to commit murder, MICH. COMP. LAWS § 750.83. In return, the prosecution dismissed the counts charging Petitioner with first-degree murder, felony firearm, and being a habitual offender. The parties agreed to a sentence of fifteen to thirty years in prison.

Petitioner subsequently attempted to withdraw his plea on the grounds that he was innocent and that his attorney's advice led him to believe he had no option but to enter a plea. The trial court denied Petitioner's motion and then sentenced Petitioner to three concurrent terms of fifteen to thirty years for the convictions.

Petitioner applied for leave to appeal his convictions. He argued through counsel that the trial court abused its discretion when it denied his motion to withdraw the plea. The Michigan Court of Appeals denied leave to appeal "for lack of merit in the grounds presented." *People v. Monroe,* No. 227163 (Mich. Ct. App. July 3, 2000). Petitioner raised the same claim in the Michigan Supreme Court, which denied leave to appeal on December 27, 2000, because it was not persuaded that the question presented should be reviewed, *See People v. Monroe,* 463 Mich. 945; 620 N.W.2d 856 (2000).

Petitioner filed a *pro se* motion for relief from judgment on or about December 16, 2001. The trial court denied Petitioner's motion after concluding that the claims lacked merit.

Petitioner then filed *pro se* applications for leave to appeal the trial court's decision. He alleged that he was denied effective assistance of trial and appellate counsel and that the trial court had failed to find a factual basis for his plea. The Michigan Court of Appeals denied leave

to appeal "for lack of merit in the grounds presented," *People v. Monroe,* No. 242946 (Mich. Ct. App. Oct. 10, 2002), and on April 29, 2003, the Michigan Supreme Court denied leave to appeal because Petitioner had "failed to meet the burden of establishing entitlement to relief under [Michigan Court Rule] 6.508(D)." *People v. Monroe,* ___ Mich. ___; 661 N.W.2d 240 (2003).

Petitioner signed and dated his habeas corpus petition on May 31, 2003. He alleges the same four claims that he presented to the state courts:

> I. Petitioner was denied his right to effective assistance of counsel guaranteed to him by both the Sixth Amendment to the United States Constitution and Michigan Constitution, Art. 1, Sec. 20, where his trial counsel's advice scared him into accepting a *nolo contend[e]re* plea despite him maintaining his innocence, thus making his plea involuntary and not intelligently made.
>
> II. Petitioner Michael Monroe was denied his right to due process of the law guaranteed to him under the Fourteenth Amendment to the United States Constitution where the trial judge in accepting his *nolo contendere* plea did not come into compliance with [Michigan Court Rule] 6.302(D)(2)(B), by failing to find a factual basis [for] the offense [to] which the defendant plead[ed].
>
> III. Petitioner Michael Monroe was deprived his due process right to effective assistance of counsel during his appeal by leave, where his appellate counsel failed to raise the claims of error set [forth] in his motion for relief from judgment.

> IV. The trial court denied Petitioner due process and equal protection of the law guaranteed to him under the Fourteenth Amendment to the United States Constitution where the trial court failed to follow [Michigan Court Rule] 6.310(B) in denying Defendant's motion for plea withdrawal where he claimed innocence and the State did not claim to be substantially prejudiced by the plea withdrawal.

Respondent urges the Court through counsel to dismiss the habeas petition.

II. Discussion

A. Claims I (ineffective assistance of trial counsel), II (failure to find a factual basis), and III (ineffective assistance of appellate counsel)

The first habeas claim alleges that Petitioner's plea was not voluntary or intelligent because trial counsel was ineffective. Petitioner contends that his trial counsel's advice scared him into pleading no contest. The second habeas claim alleges that the trial court did not comply with Michigan Court Rule 6.302(D)(2)(b), which requires trial courts to hold a hearing to establish support for a finding that the defendant is guilty.

1. Procedural Default

Respondent contends that the first two claims are barred from review by Petitioner's procedural default of

failing to raise the claims in his first state court appeal.[1] A procedural default in the habeas context is "a critical failure to comply with state procedural law. . . . " *Trest v. Cain*, 522 U.S. 87, 89 (1997). Generally,

> federal courts may not consider procedurally defaulted claims. *Seymour v. Walker,* 224 F.3d 542, 549-50 (6th Cir. 2000). A claim is procedurally defaulted if: (1) the petitioner failed to comply with an applicable state procedural rule; (2) the state courts actually enforced the procedural rule; and (3) the state courts' finding of noncompliance is an adequate and independent state ground for denying relief on the federal constitutional claim.

Cone v. Bell, 359 F.3d 785, 789 (6th Cir. 2004) (citing *Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir. 1986)). "A procedural rule is adequate only when it is firmly established and regularly followed at the time it was applied. *See Rogers v. Howes,* 144 F.3d 990, 992 (6th Cir. 1998). The rule would be an independent basis for disposition of a case if the state courts actually relied on the procedural bar. *See Harris v. Reed,* 489 U.S. 255, 261-62 (1989)." *Williams v. Coyle*, 260 F.3d 684, 693 (6th Cir, 2001), *cert. denied,* 536 U.S. 947 (2002). Federal courts may consider a procedurally defaulted claim only if "the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a

---

[1] Although Respondent argues that Petitioner's third claim also is procedurally defaulted, the third claim alleges ineffective assistance of appellate counsel. Petitioner could not be expected to have attacked his appellate attorney's assistance while the attorney was representing him on direct appeal.

fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The procedural rule in question here is Michigan Court Rule 6.508(D)(3), which "governs the procedures for collateral appeals and denies relief if the defendant alleges claims that could have been raised in the direct appeal from the conviction." *Caver v. Straub*, 349 F.3d 340, 346 (6th Cir. 2003). The rule reads in relevant part:

> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> . . . .
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief.
>
> . . . .
>
> The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

Mich. Ct. R. 6.508(D) (effective October 1, 1989).

Petitioner violated this rule by not raising claims I and II in his first round of appeals. The last state court to review the claims enforced the procedural rule by stating that Petitioner "ha[d] failed to meet the burden of establishing entitlement to relief under [Michigan Court Rule] 6.508(D)." The quoted language is a sufficient explanation for this Court to conclude that the state court based its decision on a procedural default. *Burroughs v. Makowski,* 282 F.3d 410, 413-414 (6th Cir. 2002); *Simpson v. Jones,* 238 F.3d 399, 407 (6th Cir. 2000). The rule was an adequate and independent state ground for denying leave to appeal because the rule was firmly established and regularly followed before Petitioner's conviction became final and because the Michigan Supreme Court actually relied on the rule.[2] Therefore, in order for this Court to consider the merits of Petitioner's first and second claims, he must establish "cause and prejudice" or a miscarriage of justice.

2. "Cause"

Petitioner's third claim alleges ineffective assistance of counsel. Petitioner asserts that his appellate attorney's ineffectiveness was "cause" for his failure to raise all the habeas claims on direct appeal.

> Ineffective assistance of counsel, if established, can be sufficient to establish cause and therefore allow a federal court to reach the merits of a claim defaulted in a state court so long as the ineffectiveness rises to the level of a Sixth Amendment violation resulting in prejudice to the

[2] Rule 6.508(D) has been regularly followed as of 1990. *Simpson,* 238 F.3d at 407 (citing *Luberda v. Trippett,* 211 F.3d 1004, 1008 (6th Cir.2000); *Jones v. Toombs,* 125 F.3d 945, 947 (6th Cir.1997)).

> defendant. *Murray v. Carrier,* 477 U.S. 478, 488 (1986).

Cone, 359 F.3d at 801 (Merritt, C.J., concurring). However, to establish constitutionally ineffective assistance of counsel, Petitioner has to show that his attorney's performance was deficient and that the deficient performance prejudiced his appeal, *Strickland v. Washington,* 466 US. 668, 687 (1984).

An appellate attorney need not raise every nonfrivolous argument on appeal. *Evitts v. Lucey,* 469 U.S. 387, 394 (1985); *Jones v. Barnes,* 463 U.S. 745, 751 (1983). "The process of winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray,* 477 U.S. 527, 536 (1986) (quoting *Jones,* 463 U.S. at 751-52). When an appellate attorney presents one argument on appeal rather than another, "the petitioner must demonstrate that the issue not presented 'was clearly stronger than issues that counsel did present.'" *Caver,* 349 F.3d at 348 (citing *Smith v. Robbins,* 528 U.S. 259, 289 (2002)). With these considerations in mind, the Court will proceed to evaluate Petitioner's defaulted claims to determine if the omitted issues were stronger than the sole issue appellate counsel raised on direct appeal.

a. Trial Counsel's Advice

The first habeas claim alleges that Petitioner's plea was not voluntary or intelligent because defense counsel's advice scared Petitioner into accepting the plea. According to Petitioner, his attorney told him that he could not win the case, that he would be convicted of first-degree

murder, which carries a sentence of life imprisonment without parole, that the jury would learn of his prior conviction, and that a co-defendant's statements would be enough to convict him.

"There is no *per se* constitutional impediment to encouraging guilty pleas." *Siers v. Ryan,* 773 F.2d 37, 43 (3d Cir. 1985) (citing *Corbitt v. New Jersey,* 439 U.S. 212, 218-23 (1978); *Bordenkircher v. Hayes,* 434 U.S. 357, 361-64 (1978); *Brady v. United States,* 397 U.S. 742 (1970)). Furthermore, trial counsel's advice appears to have been sound. It is unclear whether Petitioner's prior conviction for armed robbery would have been admissible in evidence, but it is true that a conviction for first-degree murder would have resulted in mandatory life imprisonment without the possibility of parole. *See* MICH. COMP. LAWS § 750.316(1). In addition, the evidence against Petitioner appears to have been sufficient to convict Petitioner of the charged offenses. The prosecutor was prepared to introduce evidence that,

> [o]n July the 24th, 1998, there was a fight outside of 14515 Griggs, in the City of Detroit. That fight involved a person by the name of Tameka Martin, along with her younger sister, Kiana, and a girl by the name of Catherine Crawley, and the Harris family that lived there at the Griggs address. After the fight was over, Tameka Martin, who for lack of a better term had lost the fight, took it upon herself to recruit a number of different individuals, who included Damon Pasha, *Michael Monroe,* Robert Martin and Eric Shaw. Later on that evening, those four individuals were in a white Dodge Neon that came by the Griggs address there at 14515 Griggs. Damon Pasha was driving the car, *Michael*

> *Monroe was in the passenger seat of the car,* Eric Shaw was in the back seat behind the passenger, and testimony would reveal that Robert Martin was in the back seat, behind the driver. As the car stopped in front of the address there on Griggs, gunshots rang out from the car. There would be testimony at trial from a Tyrone Harris who would testify that *he saw gunfire coming from the passenger side of the car* from a dark complected black male. *There would also be testimony from Eric Shaw, who was a defendant and had been acquitted in a prior trial, that Michael Monroe was firing from the passenger side of the vehicle.* As a result of the gunshots that were directed at 14515 Griggs, Kaylin Jeter was shot and died, Kenneth Carter was shot and lived, and Titus Brown was shot and lived.

(Tr. Sept. 14, 1999, at 7-8) (emphasis added).

Finally, the record does not support Petitioner's claim that, had his attorney not been so aggressive, he would have gone to trial rather than accept the plea and sentencing bargain. Trial counsel stated at the hearing on Petitioner's motion to withdraw the plea that, sometimes, he is adamant in his advocacy and that he *might have* scared Petitioner or Petitioner *might have* mistook his advocacy. (Tr. Oct. 1, 1999, at 15, 17) (emphasis added). These comments do not imply that Petitioner's plea was the product of "mental coercion overbearing the will of the defendant." *Brady,* 397 U.S. at 750.

Moreover, Petitioner stated at the plea that no promises had been made to him, other than the plea and sentencing agreement, and that no one threatened him to induce him to tender a plea. He claimed to understand the plea and sentencing agreement and the rights that he was

waiving. He also stated that he was pleading no contest freely and voluntarily. (Tr. Sept. 14, 1999, at 5-7). These "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison,* 431 U.S. 63, 74 (1977).

The Court concludes that trial counsel's performance did not fall outside the range of competence demanded of attorneys in criminal cases. *Cf. Hill v. Lockhart,* 474 U.S. 52, 56-59 (1985). Petitioner's plea appears to have been based on competent advice. Such pleas are not coerced or invalid even if the defendant was motivated to plead guilty by the strength of the evidence against him, by the likelihood that a co-defendant would testify against him, or by the desire to accept the certainty or probability of a lesser penalty. *Brady,* 397 U.S. at 749-58. Because "trial counsel performed adequately, [the Court's] inquiry is at an end; by definition, appellate counsel cannot be ineffective for a failure to raise an issue that lacks merit." *Greer v. Mitchell,* 264 F.3d 663, 676 (6th Cir. 2001).

b. The Factual Basis for the Plea

The second habeas claim alleges that the trial court did not comply with Michigan Court Rule 6.302(D)(2)(b), which reads:

> (2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:
>
> . . .
>
> (b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of the offense

> charged or the offense to which the defendant is pleading.

According to Petitioner, the trial court did not make a finding that the facts offered by the prosecutor supported a conviction for the offenses to which he pleaded no contest.

The record indicates that the trial court asked the parties whether a factual basis had been established, but the court did not say that it found the facts supported a finding of guilt. However, after the prosecutor offered a factual basis for the no contest plea, the attorneys stated that they were satisfied with the facts as given, and the trial court accepted Petitioner's plea. (Tr. Sept. 14, 1999, at 9-10). The trial court implicitly found that the facts supported the no contest plea when it accepted the plea after having determined that the parties were satisfied with the factual basis for the plea.[3]

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[3] Petitioner would have no right to habeas relief on the basis of his second claim even if his claim were not procedurally defaulted, because "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241; *Rose v. Hodges*, 423 U.S. 19, 21 (1975) *(per curiam)." Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

The Supreme Court has stated that "an express admission of guilt . . . is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). In other words, "there is no constitutional requirement that a trial judge inquire into the factual basis of a plea." *Roddy v. Black*, 516 F.2d 1380, 1385 (6th Cir. 1975). The failure of a state trial judge to conduct an on-the-record inquiry into the factual basis for a plea is not

(Continued on following page)

3. Prejudice; Miscarriage of Justice

The Court concludes for the reasons given above that Petitioner's first and second habeas claims are not clearly stronger than the claim appellate counsel raised on direct appeal. Therefore, appellate counsel was not ineffective, and Petitioner cannot rely on ineffective assistance of appellate counsel as "cause" to excuse his noncompliance with Rule 6.508(D). The Court need not determine if Petitioner has demonstrated the requisite prejudice because he has not established cause to excuse his procedural default. *Willis v. Smith,* 351 F.3d 741, 746 (6th Cir. 2003) (citing *Simpson,* 238 F.3d at 409) (citing *Smith,* 477 U.S. at 533; *Long v. McKeen,* 722 F.2d 286, 289 (6th Cir.1983)).

The remaining question is whether this Court's failure to consider the substantive merits of Petitioner's first two claims will result in a miscarriage of justice. The exception for miscarriages of justice requires showing that a constitutional violation probably resulted in the conviction of one who is actually innocent of the crime. *Schlup v. Delo,* 513 U.S. 298, 326-27 (1995). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency," *Bousley v. United States,* 523 U.S. 614, 623 (1998). Although Petitioner maintains that he is innocent, his claim is not credible because he has not submitted any new and reliable evidence demonstrating that he is actually innocent. *Schlup,* 513 U.S. at 324.

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a basis for habeas relief. *United States v. McGlocklin,* 8 F.3d 1037, 1047 (6th Cir 1993) (*en banc*).

B. Claim IV (denial of the motion to withdraw the plea)

Petitioner's fourth and final claim alleges that the trial court failed to comply with Michigan Court Rule 6.310(B), which governs requests to withdraw a plea before sentencing.[4] Petitioner asserts that the trial court abused its discretion in denying his motion to withdraw his plea. He alleges that his claim of innocence was a just and fair reason for withdrawing the plea and that the prosecution failed to show it would be substantially prejudiced by the withdrawal.

Although Petitioner styles the heading for his fourth claim as a federal due process and equal protection argument, he argues the claim entirely under state law. Federal courts may not grant the writ of habeas corpus on the basis of a perceived error of state law. *Pulley v. Harris,* 465 U.S. 37, 41 (1984). "[A] district court may grant a writ of habeas corpus 'only on the ground that [a state prisoner] is in custody in violation of the Constitution or laws or treaties of the United States,' 28 U.S.C. § 2254(a)." *Robinson v. Stegall,* 355 F.3d 916, 919 (6th Cir. 2004). "There is no constitutional right to withdraw a guilty plea,"

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[4] The rule reads:

> (B) Withdrawal Before Sentence. On the defendant's motion or with the defendant's consent, the court in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by MCR 6.311(B).

Mich. Ct. R. 6.310(B).

Freeman v. Muncy, 748 F. Supp. 423, 429 (E.D. Va. 1990) (citing *Siers*, 773 F.2d at 37), and Petitioner not shown any basis for concluding that the trial court's denial of his motion to withdraw the plea violated his rights to due process and equal protection of the law. Consequently, Petitioner's fourth claim is not cognizable on habeas review.

III. Conclusion

Petitioner's first and second claims are procedurally defaulted, his third claim lacks merit, and his fourth claim is not cognizable, The Court, therefore, **DISMISSES** Petitioner's application for the writ of habeas corpus [Doc. #1].

The Court declines to issue a certificate of appealability because Petitioner has not shown that reasonable jurists would find the Court's assessment of his claims debatable or wrong. Nor has Petitioner shown that reasonable jurists would find it debatable whether the Court was correct in its procedural default ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Date: Apr 5, 2004

/s/ Victoria A. Roberts
VICTORIA A. ROBERTS
UNITED STATES
DISTRICT JUDGE